**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| DIDLAKE, INC., | ) | |
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| Respondent, | ) | |
| | ) | |
| and | ) | Case No. 05-RC-179494 |
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| PUBLIC SERVICE EMPLOYEES LOCAL UNION 572, | ) | |
| | ) | |
| | ) | |
| Petitioner. | ) | |

**MOTION FOR STAY OF CERTIFICATION OF REPRESENTATIVE**
**AND MEMORANDUM IN SUPPORT THEREOF**

The Respondent, Didlake, Inc. ("Didlake"), pursuant to Rule and Regulation § 102.67(j) of the National Labor Relations Board (the "Board") hereby moves the Board to stay the Certification of Representative entered by the Regional Director on May 5, 2017, in this matter. In support thereof, Didlake states as follows:

## I. INTRODUCTION.

Pending before the Board is Didlake's request for review covering nearly a year of litigation over whether fifteen individuals with significant disabilities at the Army National Guard Readiness Center in Arlington, Virginia, (the "Guard") should be represented by the Public Service Employees Union Local 572 (the "Union").[1] The pending request for review (the "Request for Review") challenges two decisions and directions of election by the Regional Director, each of which involved three-day hearings and post-hearing briefs. Didlake's fifty-page request for review, timely filed on June 9, 2017, demonstrates the significance of the issues decided upon by the Regional Director and the extent of his error.

[1] The Union's petition for representation was filed on July 6, 2016.

Central to explaining the amount of time and resources spent on this representation proceeding is not simply the significance of the legal issues involved and the degree of the Regional Director's error. It is also the special people who have been and who will continue to be affected by this proceeding and who stand to lose if the Certification of Representative is upheld. Didlake's mission is "to create opportunities to enrich the lives of people with disabilities." (Tr. 39:12-39:14.)[2] The fifteen individuals with significant disabilities at the Guard are not average custodians. They are participants in the federal government's AbilityOne Program, which assists qualified nonprofit organizations like Didlake to provide opportunities to individuals with severe disabilities.[3] (Tr. 223:22-224:1); 41 C.F.R. § 51-1.3. Through numerous rehabilitative supports and services, Didlake provides an "umbrella of support" to the participants in the AbilityOne Program so that they have opportunities that they would not be able to obtain without them. (Tr. 54:1-54:10.) Many of these rehabilitative supports are described in the Request for Review. (*See, e.g.*, Request for Review 5-14, 22-24 (job coaching, specialized training, assistance with hygiene and transportation issues, etc.).)

Because of Didlake's "primarily rehabilitative" relationship with the participants at the Guard, the fifteen participants are not statutory employees under the National Labor Relations Act (the "Act"), and the Board should decline to assert any jurisdiction it may have over them. *See Brevard Achievement Center*, 342 NLRB 982, 983 (2004) (individuals in "primarily rehabilitative" relationship with respondent not statutory employees). The Regional Director

[2] The transcript for the representation hearing, which was the first hearing, is cited with a "Tr." prefix.

[3] Those individuals with significant disabilities in the petitioned-for unit may subsequently be referred to in this Request simply as "participants."

erroneously determined otherwise in his first Decision and Direction of Election dated October 5, 2016.[4] The Regional Director then compounded this error by overturning the results of the first election in his Decision and Direction of Second Election dated March 24, 2017. Didlake is now seeking a review of both of these erroneous decisions.

While Didlake's request for review is pending, the fifteen participants at the Guard face the prospect of their rehabilitative relationship with Didlake being damaged or disturbed on account of them being erroneously deemed to be represented by the Union. *See Davis Mem'l Goodwill Indus., Inc. v. NLRB*, 108 F.3d 406, 412 (D.C. Cir. 1997) (noting that Board has "recogniz[ed] that in the rehabilitation setting the employer may very well safeguard employee interests more effectively than a union"). Rather than create this unnecessary turmoil, the Board should use its authority to stay the Certification of Representative while it is fully resolving the Request for Review. Failing to grant the stay would needlessly inject further disruption into Didlake's rehabilitative program and threaten the continuity of the rehabilitative supports and services that Didlake provides to the participants at the Guard.

## II. ARGUMENT.

The circumstances of this proceeding justify the "extraordinary relief" of staying the Certification of Representative during the pendency of the Request for Review. 29 C.F.R. 102.67(j); *see also Maremont Corp.*, 239 NLRB 240 (1978) (Board staying certification of representative during pendency of request for review). Staying the certification is the only sensible and prudent way to safeguard the rights of the participants at the Guard and to minimize the disruption of Didlake's rehabilitative services to these participants. 29 C.F.R. 102.67(j)(2)

[4] Similarly, the Regional Director also erroneously determined that the petitioned-for unit was a proper unit.

(stays to be granted when "necessary under the particular circumstances"). Both (1) the nature and extent of the Regional Director's errors that are being requested to be reviewed and (2) the consequences of certifying the Union as the participants' bargaining representative warrant the "extraordinary" relief requested in this Motion.

A. **The nature and extent of the Regional Director's errors constitute exceptional circumstances warranting a stay of the Certification of Representative.**

The many errors committed by the Regional Director in his two decisions and directions of election are significant and illustrate why staying the Certification of Representative is justified. Over the course of fifty pages, complete with extensive record citations, the Request for Review meticulously identifies the Regional Director's errors in showing why the decisions and directions of election must be reviewed. While repeating all of the Regional Director's erroneous factual findings and legal conclusions is not necessary in this Motion, the Regional Director's central error in determining that the participants are statutory employees is of particular relevance in supporting the imposition of a stay of the Certification of Representative.

The Regional Director's central error is finding that Didlake's rehabilitative program at the Guard constitutes an industrial program geared towards meeting a bottom-line production standard rather than a *bona fide* rehabilitative program dedicated to assisting participants with disabilities succeed. (Request for Review 5-14). In the first decision and direction of election, the Regional Director (1) ignores unrebutted testimony from Didlake's head of rehabilitative services concerning Didlake's mission and the scope of the services it provides, (Request for Review 5-6); (2) completely miscasts the roles and objectives of Didlake's trained job coaches and operations staff, (Request for Review 6-13, 22-24); and (3) errs in simply equating the fact that Didlake has contractual obligations to meet at the Guard with a "typically industrial"

business orientation. (Request for Review 13-14); *see Brevard,* 342 NLRB at 984 (contrasting "primarily rehabilitative" relationship with "typically industrial relationship"). The scope and significance of these errors is significant. For example, when discussing the roles and objectives of job coaches, the Regional Director makes contradictory findings about the services that job coaches provide and the reasons they provide them. Moreover, one of the Regional Director's central conclusions—that most interventions by job coaches at the Guard are instigated by the project manager reporting "work deficiencies" to a job coach—is squarely contradicted by the record. (Request for Review 6-13.)

The Regional Director's fundamental error about Didlake's rehabilitative program not only dovetails with but also constitutes a basis of this Motion. The Board has recognized that collective bargaining is not only improper in the context of rehabilitative relationships but also that it risks harming those relationships. *See Brevard,* 342 NLRB at 984 ("For nearly half a century, the Board has declined to assert jurisdiction over employment relationships, such as sheltered workshops or rehabilitative vocational programs, which are primarily rehabilitative in nature"); *Davis,* 108 F.3d at 412 (noting that Board has "recogniz[ed] that in the rehabilitation setting the employer may very well safeguard employee interests more effectively than a union"). The Regional Director's fumbling of Didlake's central purpose and function not only warrants the reversal of the Regional Director's directions of election but also underscores the very reason why a stay is warranted: collective bargaining should not be purported to be imposed on primarily rehabilitative relationships. Directing that collective bargaining occur before the Board can fully review the Regional Director's erroneous factual findings and legal conclusions is folly. Failing to impose a stay keeps this proceeding on an errant course that imprudently compounds the very errors that the Board needs to correct and threatens those rehabilitative

interests that the Board has vowed to protect. *See Yale Univ. & Unite Here Local 33 Petitioner*, 365 NLRB No. 40, *1 (2017) (Member Miscimarra, dissenting) (stay of election warranted when request for review involved issue of statutory employee status of unit members who were students "ill-suited" to representation under the Act) (citation omitted). Because the Regional Director made numerous errors implicating the very reason why a stay should be imposed, including the fundamental error about the nature of Didlake's relationship with the participants at the Guard, the Motion should be granted.

**B. <u>Failing to stay the Certification of Representative needlessly jeopardizes Didlake's mission and rehabilitative program with the participants at the Guard.</u>**

Not only does the Certification of Representative rest on a clearly erroneous foundation that warrants this Motion to Stay but failing to stay it will cause harm and disruption to Didlake's rehabilitative program at the Guard and the rehabilitative relationships it has with the Guard participants. As stated above, the Board has determined that the purposes of the Act are inconsistent with primarily rehabilitative relationships and that the imposition of collective bargaining on such relationships can do harm. *See Brevard*, 342 NLRB at 988 (individuals in primarily rehabilitative relationships not within Act's purpose); *Goodwill Indus.*, 108 F.3d at 412. In fact, in *Goodwill Indus. of S. California*, 231 NLRB 536, 537–38 (1977) (distinguished and overruled in part by *Goodwill Industries of Denver*, 304 NLRB 764 (1991) and *Goodwill Industries of Tidewater*, 304 NLRB 767 (1991)), the Board raised the following concerns:

> To permit collective bargaining in this context is to risk a harmful intrusion on the rehabilitative process by the Union's bargaining demands. For example, if the Union demanded higher wages, this could well force the Employer to either reduce its client work force or hire more productive workers-thus compromising the Employer's rehabilitative efforts. Union demands for higher benefits for senior employees might tempt the Employer to reconsider its policy of keeping clients on as long as necessary. Conversely, union demands for unlimited employment tenure

> could prejudice the Employer's efforts to provide charitable employment to as many disabled people as possible. The collective-bargaining process, in short, is likely to distort the unique relationship between Employer and client and impair the Employer's ability to accomplish its salutary objectives.

Although *S. California* was challenged and partially disavowed in later opinions, its concerns on this policy point still have currency and are relevant to the case at bar.

When the essential assumption of the Act—that the relationship between management and employees are controlled by economic considerations—is not present, then the purpose of the Act fails as well. In fact, as is illustrated by the examples given in *S. California,* application of the Act's processes and procedures can damage the rehabilitative relationships for which they are poorly suited. *See Yale,* 365 NLRB No. 40, *1 (Member Miscimarra, dissenting) (in part justifying motion to stay on basis that Board's "processes and procedures" were "ill-suited" to unit members) (citation omitted). Under the circumstances of this case, numerous questions immediately arise along the lines of those posed in *S. California* that illustrate the mismatch between the Act and Didlake's relationship with the participants. For example:[5]

- Does the Union contend that rehabilitative services, such as job coach services, training, and job carving, constitute mandatory subjects of bargaining, thereby attempting to prevent Didlake from making flexible, timely, and particularized modifications to such services in the best interests of participants on Didlake's own accord unless the issue has been bargained in good faith to impasse?

- What occurs if the Union attempts to bargain regarding the provision of rehabilitative services, such as asking for fewer rehabilitative services in exchange for additional compensation?

- Does the Union attempt to negotiate shifts and custodial assignments in a more uniform manner than presently exist between the disparate unit

[5] None of the examples listed should be viewed as admissions that the subjects discussed constitute mandatory subjects of bargaining.

members, and if so, how does it do so given the discrepancies in the special needs of the participants at the Guard?

- Given the significant differences among the unit members, does the Union attempt to demand more uniformity in treatment among unit members with regard to issues concerning behavior and performance of tasks, thereby potentially imperiling the positions of those participants who have more difficulty performing tasks and more behavioral issues due to their disabilities?

Given the Board's acknowledgement of the dangers imposed by collective bargaining in the context of primarily rehabilitative relationships, it frankly makes no sense for the Board to seek to inject a collective bargaining representative at this juncture. Simply put, if the Board imposes a stay, the worst-case scenario is that this matter is delayed in being resolved in favor of the Union. On the other hand, if the Board fails to impose a stay, the fabric of Didlake's rehabilitative program and the supports and services received by the participants are jeopardized and could be damaged even if the Regional Director's erroneous conclusions are later overruled.

## III. CONCLUSION.

For the foregoing reasons, Didlake hereby requests that a stay of the Certification of Representative be imposed during the pendency of the Request for Review and that the Board grant Didlake all other relief deemed just and appropriate.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on June 13, 2017, a copy of the foregoing was sent via electronic mail to:

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(2) Charles Posner, Regional Director, Region 5; Bank of America Center, Tower II, 100 S. Charles Street, 6th Floor, Baltimore, MD 21201; Fax: (410) 962-2198; Region5@NLRB.gov.

/s/ *Luke J. Archer*
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